

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MICHAEL A. GOUDY
Claimant

VS.

EXIDE TECHNOLOGIES
Respondent

AND

AMERICAN ZURICH INSURANCE COMPANY
Insurance Carrier

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Docket No. 1,049,789

ORDER

Claimant appealed the December 15, 2010, Award entered by Administrative Law Judge Bruce E. Moore. The Workers Compensation Board heard oral argument on March 23, 2011.

APPEARANCES

Jan L. Fisher of Topeka, Kansas, appeared for claimant. Jared T. Hiatt of Salina, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

This is a claim for complications from the repair of a hernia. In the December 15, 2010, Award, ALJ Moore determined claimant failed to prove he was entitled to disability benefits beyond those provided in K.S.A. 44-510d and, therefore, claimant was limited to medical benefits and the temporary total disability benefits he received for the repaired hernia. ALJ Moore also determined that future medical will be determined upon proper application.

Claimant contends the evidence shows he sustained an additional permanent condition beyond his hernia. He argues he has a 5% whole body functional impairment and is entitled to receive benefits for a work disability.¹ Claimant requests the Board grant him permanent disability benefits in this claim.

Respondent maintains claimant has not sustained his burden of proof that he is entitled to a work disability. Respondent argues:

The only objective injury suffered by Claimant is a traumatic hernia. The fact that Claimant continues to have postsurgical pain does not entitle him to compensation beyond that provided by K.S.A. 44-510d[(a)](22). There is no objective evidence that Claimant suffered nerve damage as a result of his hernia repair operations and Dr. Beamer's opinion supports the decision of ALJ Moore. Even if the Claimant suffered such an injury, there is no objective evidence that it diminished his ability to perform his daily activities.²

Respondent requests the Board affirm the Award.

The issues before the Board on this appeal are:

1. What is the nature and extent of claimant's injuries and disability?
2. Is claimant entitled to future medical benefits?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

Claimant began working for Exide Technologies (Exide) on June 27, 2005.³ At Exide, claimant worked on the formation line where his job was to fill batteries with battery acid, charge the batteries and place them on another line to be tested.⁴ Respondent does not contest that claimant suffered a right inguinal hernia while working for respondent on October 20, 2005.

¹ A permanent partial disability under K.S.A. 44-510e that is greater than the whole person functional impairment rating.

² Respondent's Brief at 17 (filed Feb. 7, 2011).

³ Goudy Depo. at 12.

⁴ R.H. Trans. at 10.

Claimant underwent right inguinal hernia repair on November 9, 2005, by Dr. Macy, whose records are not in evidence. Claimant eventually returned to work on the formation line with no restrictions and reported that he got along “pretty good,” but kept experiencing pains.⁵ Claimant continued to work at Exide until September 10, 2006.⁶ Claimant testified he left work due to the difficulty of the job and the fact the pain kept getting worse and to begin a new job with a different employer.

Q. (Mr. Denning) Now at some point did you decide to leave the employment of Exide?

A. (Claimant) Yes, I did.

Q. Okay. And what was the reason for that?

A. It just -- I felt like the job was tearing me apart, you know. It just seemed like the pain was getting a little worse. I got a good job offer building ethenol [sic] plants with TIC, the industrial company. I built -- I was offered a job at \$22.00 an hour running a crane in Nebraska at Rego (sp) ethenol [sic] plant. Not Rego, I can't remember the name of the city. But, anyway, that's -- that was, and it's like, okay, I mean, that's a whole lot easier than, you know, throwing these batteries. Sure, I got to do it, you know.⁷

Claimant worked at TIC but quit to spend time with his daughter before a second hernia surgery.⁸ Claimant underwent the second hernia surgery by Dr. Macy on February 7, 2007. The purpose of this surgery was described as “a second right inguinal hernia repair and a neuroma removed.”⁹ Unfortunately after his second surgery claimant experienced pain around the pubic area, which he experiences after sexual relations. He also experiences pain in his left testicle when he gets up from a kneeling position.¹⁰

Since claimant's injury his work history, although not entirely clear, is as follows:

- October 20, 2005, through September 10, 2006 – Exide. AWW as set out above.

⁵ Goudy Depo. at 19.

⁶ *Id.*, at 26-27.

⁷ *Id.*, at 24-25.

⁸ *Id.*, at 27-28.

⁹ Beamer Depo., Ex. 2.

¹⁰ Goudy Depo. at 21.

- September 11, 2006, through approximately February 6, 2007 – TIC. AWW of \$22 per hour plus 10 to 12 hours a week overtime paid at time and a half. Claimant also received \$65 or more per diem.¹¹
- February 7, 2007, through approximately May 8, 2007 – off work due to second hernia surgery. Claimant received temporary total disability benefits.¹²
- May 9, 2007, through December 31, 2007 – claimant worked as an independent subcontractor.¹³ Claimant had no wage information for this time period.
- January 1, 2008, through December 31, 2008 – claimant worked as an independent contractor and indicated he earned \$7,000 for the year.¹⁴ However, there is no evidence on the number of weeks or hours per week claimant worked in 2008.
- January 1, 2009, through December 31, 2009 – claimant worked as an independent contractor and indicated he earned \$12,947 for the year.¹⁵ There is no evidence on the number of weeks or hours per week claimant worked in 2009.
- January 1, 2010, through approximately April 14, 2010 – claimant worked as an independent contractor and indicated he earned no more than \$2,000.¹⁶
- April 15, 2010, through approximately May 5, 2010 (three weeks) – claimant worked at Loux Home Improvement working approximately 30 hours a week at \$12 per hour.¹⁷

¹¹ R.H. Trans. at 23-25.

¹² Goudy Depo. at 30.

¹³ *Id.*, at 31-32.

¹⁴ R.H. Trans. at 17.

¹⁵ *Id.*, at 18.

¹⁶ *Id.*

¹⁷ *Id.*, at 12-14.

- May 6, 2010, through approximately September 6, 2010 – claimant was paid \$13 per hour to brush hog.¹⁸ However, from claimant's testimony it is difficult to ascertain the number of weeks or hours per week he performed this job.
- September 7, 2010 – claimant indicated he was cleaning out a house for \$9,000, but from that would have to pay expenses and laborers.¹⁹

Three physicians who saw claimant testified in this case: Dr. R. Larry Beamer, Dr. David G. Sollo and Dr. P. Brent Koprivica. Dr. Beamer is a general surgeon whose specialty is gastrointestinal surgery and endoscopy. Claimant was first seen by Dr. Beamer at respondent's request on July 10, 2008.²⁰ By that date, claimant already had undergone both of his hernia surgeries. Upon examination, claimant complained to Dr. Beamer of tenderness in the right pubic area and there was a questionable small mass on the right pubic tubercle region. Dr. Beamer referred claimant to Dr. Sollo, a pain management physician, for a selective nerve block and to try to determine whether claimant's pain was secondary to neuralgia. Claimant was given no restrictions by Dr. Beamer.²¹

Claimant again saw Dr. Beamer on January 6, 2009, after claimant received a pain block by Dr. Sollo. Dr. Beamer opined claimant's groin pain is musculoskeletal in nature and not related to neuralgia. In addition to complaining of right groin pain, claimant reported left testicular pain at the January 6, 2009, visit. Dr. Beamer opined that claimant's left testicular pain should not have been related to his initial injury nor his subsequent operations.²²

Claimant returned to Dr. Beamer for follow-up visits in February, July and October 2009. In a January 4, 2010 letter, Dr. Beamer stated:

I do not know the exact etiology of his pain. Since the pain blocks failed, I do not think it is based on ilioinguinal neuralgia. It could be secondary to the inflammation from his prior operations.²³

¹⁸ *Id.*, at 13-14.

¹⁹ *Id.*, at 14-16.

²⁰ Beamer Depo. at 7-8.

²¹ *Id.*, at 8-9.

²² *Id.*, at 9-10.

²³ *Id.*, Ex. 2.

Dr. Beamer recommended a 2% functional impairment rating, but he could not state what specific guideline he used to reach this opinion. Dr. Beamer did not give claimant any work restrictions.²⁴ However, on cross-examination by claimant's counsel, Dr. Beamer indicated that if claimant could not perform a job requiring repetitive lifting of more than 50 pounds, claimant should restrict himself from that job, but only if a particular activity at the job increased his pain.²⁵

Dr. David G. Sollo, a pain management specialist, saw claimant once on October 22, 2008.²⁶ Claimant indicated to Dr. Sollo he had a lesser pain around the right pubic tubercle and a second pain in the right groin, along the inguinal incision. Dr. Sollo diagnosed claimant with pubic tubercle osteitis and a right ilioinguinal neuralgia. Dr. Sollo described the osteitis as:

There is a bump on your pubic bone, which a lot of surgeons will put a suture in near to repair a hernia, and oftentimes that will be chronically inflamed after a hernia, and it's very close to the genital femoral nerve, which can then be irritated and cause pain going into a testicle.²⁷

In explaining neuralgia, Dr. Sollo noted there is an ilioinguinal nerve that passes through the area commonly in the site for an inguinal hernia repair that can often be cut, damaged or irritated during such a repair.²⁸ Dr. Sollo thought claimant had irritation along the remnants of that ilioinguinal nerve.²⁹

Dr. Sollo performed a nerve block on claimant, but indicated claimant received little improvement.³⁰ Dr. Sollo indicated an ilioinguinal neuralgia is a typical consequence of a hernia and surgery. However, the nerve damage to claimant caused no loss of motor control, as it is a sensory nerve only.³¹ No testimony was elicited from Dr. Sollo concerning claimant's work restrictions.

²⁴ *Id.*, at 11.

²⁵ *Id.*, at 19.

²⁶ Sollo Depo. at 4-5.

²⁷ *Id.*, at 6-7.

²⁸ *Id.*, at 7.

²⁹ *Id.*

³⁰ *Id.*, at 9-10.

³¹ *Id.*, at 14-16.

Claimant was examined by Dr. P. Brent Koprivica, certified by the American Board of Emergency Medicine and the American Board of Preventive Medicine, at the request of claimant's counsel on April 17, 2010. Dr. Koprivica diagnosed claimant with ongoing chronic right groin pain. The doctor believed there was a musculoskeletal component with localized tenderness over the pubic tubercle region and an injury to claimant's ilioinguinal nerve with neuroma formation.³²

Consulting the *AMA Guides*,³³ Dr. Koprivica assigned claimant a 5% functional impairment to the body as a whole. Dr. Koprivica recommended permanent restrictions of self-limiting lifting and carrying to less than 50 pounds; avoiding frequent or constant lifting and carrying; and avoiding sustained or awkward postures, such as forward bending, especially against hard surfaces where there is direct pressure put in the right lower abdominal area. Dr. Koprivica opined claimant suffered a 61% task loss.³⁴

Of critical importance to this case is the following testimony of Dr. Koprivica, wherein he explains why claimant's injuries extend beyond the hernia:

Q. (Ms. Fisher) Doctor, as you know, there is an issue in each and every hernia case as to whether the impairment or difficulties that he's having are from the hernia itself or from a structure separate from the hernia. In this particular case, would either of your diagnoses be based on a functional impairment or functional problem in a structure outside the hernia?

A. (Dr. Koprivica) Yes. I mean both the musculoskeletal pain which is the abdominal wall and the ilioinguinal neuralgia are structures that are distinct from the hernia so they are the source of ongoing impairment.

Q. But the nerve problem, the ongoing irritation of this particular nerve, is this a sensory nerve?

A. Yes.

Q. Can you have a functional impairment from sensory nerve according to the AMA guidelines?

A. You can.

³² Koprivica Depo., Ex. 2.

³³ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

³⁴ Koprivica Depo. at 15.

Q. And I ask you that because there is a board case where basically there was damage to the nerve and it resulted in numbness and there was a finding there is no functional impairment from a sensory nerve. So the AMA guidelines specifically allow a functional impairment for damage to this nerve?

A. Yes.

Q. Okay?

A. And in particular, when you look at -- I'm blank on the table but when you assign impairment for the sensory portion of the nerve function, they look at dysesthesias which is the painful sensation from a damaged nerve as being impairing.

Q. Okay. Did you feel that his condition reached maximum medical improvement?

A. I did.

Q. As such, did you assign a permanent impairment of function in consultation with the AMA Guidelines to the Evaluation of Permanent Impairment, Fourth Edition Revised *[sic]*?

A. I did.

Q. And that was?

A. A five percent whole person impairment.

Q. How did you derive that?

A. I derived it looking at the definition of impairment on page two and making reference to similar levels of loss of functional capabilities on conditions that are specifically diagnosed in the Fourth Edition of the Guides; namely, chronic back pain that is soft tissue in nature is a five percent impairment.

Q. Is any part of that impairment for the hernia itself versus the outside structures that you have indicated have been impaired?

A. No. The hernia itself is repaired so it's not impairing.³⁵

ALJ Moore succinctly expressed the issue in this case when he stated:

³⁵ *Id.*, at 11-13.

The crux of the dispute before the court is whether Claimant is limited to recovery for a traumatic hernia, or whether he has established an injury above and beyond a hernia that would entitle him to a permanent partial “work” disability benefit.³⁶

The ALJ noted in the Award that Dr. Sollo and Dr. Koprivica believe claimant may have ilioinguinal nerve damage, while Dr. Beamer does not. He also noted that Dr. Sollo and Dr. Beamer agree that damage or irritation of that nerve would not cause a loss of function. ALJ Moore also stated that no physician has attributed claimant’s left testicle pain to claimant’s hernia or subsequent surgeries. The ALJ then determined claimant only suffered a traumatic hernia, a scheduled injury.

However, Dr. Beamer does note in a letter dated January 4, 2010: “It [pain] could be secondary to the inflammation from his prior operations.”³⁷ All three physicians agree claimant’s hernia was repaired, all agree he continues to suffer pain and that he has a musculoskeletal component to his injury. Claimant described his pain at his deposition and at regular hearing and indicated he experienced pain after his surgeries in three distinct locations.

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.³⁸ “‘Burden of proof’ means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party’s position on an issue is more probably true than not true on the basis of the whole record.”³⁹ Claimant has the burden of proving he has more than a scheduled hernia injury.

All three doctors who testified indicated claimant has a musculoskeletal injury in his groin. Dr. Beamer opined claimant’s groin pain is musculoskeletal in nature and not related to neuralgia. Dr. Sollo diagnosed claimant with pubic tubercle osteitis, which he described as a chronically inflamed bump on the pubic bone.⁴⁰ Finally, Dr. Koprivica diagnosed ongoing chronic right groin pain, which he believed had a musculoskeletal component and is a complication of the hernia surgeries. The opinions regarding claimant’s musculoskeletal injury are credible and the Board finds the claimant suffers from a musculoskeletal injury related to his hernia surgeries.

³⁶ ALJ Award (Dec. 15, 2010) at 6-7.

³⁷ Beamer Depo., Ex. 2.

³⁸ K.S.A. 2005 Supp. 44-501(a).

³⁹ K.S.A. 2005 Supp. 44-508(g).

⁴⁰ Sollo Depo. at 6.

With regard to claimant's ilioinguinal nerve injury, Dr. Beamer indicated claimant suffered no injury to the ilioinguinal nerve, yet referred claimant to Dr. Sollo for a nerve block. Dr. Sollo and Dr. Koprivica indicated that claimant had either a damaged, inflamed or irritated ilioinguinal nerve. Dr. Sollo tried to numb the nerve so as to relieve the pain. He indicated that because a neuroma was removed in claimant's second surgery, there had to be some nerve damage. Simply because the nerve block was unsuccessful, Dr. Sollo indicated, does not mean claimant did not have nerve damage. Dr. Sollo testified: "The local probably never hit what was left of the nerve, and that's real common, too, in someone who's had two surgeries with scar tissue, the nerve's been moved, you can't always hit it."⁴¹ In fact, Dr. Sollo indicated removal of the neuroma is objective evidence of nerve damage.⁴² The evidence indicates claimant's ilioinguinal nerve was injured during his hernia surgeries. Dr. Beamer referred claimant to Dr. Sollo for the nerve block, and both Dr. Sollo and Dr. Koprivica indicated claimant had two injuries distinct and separate from the hernia.

Every direct and natural consequence that flows from a compensable injury, including a new and distinct injury, is also compensable under the Workers Compensation Act. In *Jackson*,⁴³ the Court held:

When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury. (Syllabus 1).

The ALJ stated in his Award: "An ilioinguinal neuralgia is a 'typical' consequence of a hernia repair surgery."⁴⁴ The Board finds, however, that even though claimant's musculoskeletal injury and the ilioinguinal nerve damage were directly related to his hernia surgeries they are separate and distinct injuries from the hernia.

In the Award, the ALJ stated:

An ilioinguinal neuralgia is a "typical" consequence of a hernia repair surgery. It is neither rare nor uncommon. It does not affect any motor function. "Neuritis" is defined as "inflammation of a nerve, marked by neuralgia, hyperesthesia,

⁴¹ *Id.*, at 14.

⁴² *Id.*, at 13.

⁴³ *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

⁴⁴ ALJ Award (Dec. 15, 2010) at 6.

anesthesia, or parasthesia . . .” “Neuralgia” is defined as “nerve pain.” **Stedman’s Medical Dictionary, Fourth Unabridged Lawyer’s Edition.**⁴⁵

Claimant’s attorney, in her brief, objects to the ALJ taking judicial notice of the foregoing. The Board previously addressed this issue in *Ridge*.⁴⁶ There, the Board stated:

The Workers Compensation Act is blank regarding judicial notice, but K.S.A. 60-409 states:

(a) Judicial notice shall be taken without request by a party, of the common law, constitutions and public statutes in force in every state, territory and jurisdiction of the United States, and of such specific facts and propositions of generalized knowledge as are so universally known that they cannot reasonably be the subject of dispute.

(b) Judicial notice may be taken without request by a party, of (1) private acts and resolutions of the Congress of the United States and of the legislature of this state, and duly enacted ordinances and duly published regulations of governmental subdivisions or agencies of this state, and (2) the laws of foreign countries and (3) such facts as are so generally known or of such common notoriety within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute, and (4) specific facts and propositions of generalized knowledge which are capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy.

(c) Judicial notice shall be taken of each matter specified in subsection (b) of this section if a party requests it and (1) furnishes the judge sufficient information to enable him or her properly to comply with the request and (2) has given each adverse party such notice as the judge may require to enable the adverse party to prepare to meet the request.

K.S.A. 60-410 states:

(a) The judge shall afford each party reasonable opportunity to present to him or her information relevant to the propriety of taking judicial notice of a matter or to the tenor of the matter to be noticed.

(b) In determining the propriety of taking judicial notice of a matter or the tenor thereof, (1) the judge may consult and use any source of pertinent information, whether or not furnished by a party;

⁴⁵ *Id.*

⁴⁶ *Ridge v. Humboldt Industries, Inc.*, No. 1,018,782, 2008 WL 2354917 (Kan. WCAB May 14, 2008).

and (2) no exclusionary rule except a valid claim of privilege shall apply.

(c) If the information possessed by or readily available to the judge, whether or not furnished by the parties, fails to convince the judge that a matter falls clearly within K.S.A. 60-409, or if it is insufficient to enable him or her to notice the matter judicially, he or she shall decline to take judicial notice thereof.

(d) In any event the determination either by judicial notice or from evidence of the applicability and the tenor of any matter of common law, constitutional law, or of any statute, private act, resolution, ordinance or regulation falling within K.S.A. 60-409, shall be a matter for the judge and not for the jury.

Before judicial notice may be taken of a requested matter, the judge must first give each party an opportunity to address the request. Here, no such opportunity appears to have been granted the parties. No hearing was held and there does not appear to be a request for briefs on respondent's request for judicial notice. The ALJ merely listed respondent's requests for judicial notice in the Award, without actually listing either the deposition or the estate file as being part of the record or otherwise ruling on the request.

Based upon *Ridge* and K.S.A. 60-409 and K.S.A. 60-410, the Board will not consider the information in the Award from Stedman's Medical Dictionary, Fourth Unabridged Lawyer's Edition as the parties were not afforded a reasonable opportunity to present to the ALJ information relevant to the propriety of taking judicial notice.

The ALJ indicated that because the ilioinguinal nerve is a sensory nerve and not a motor nerve, damage to it cannot cause an impairment. The ALJ cited *Jeffery*,⁴⁷ wherein Mr. Jeffery suffered a loss of sensitivity and numbness in his scrotum, general right abdominal wall and right upper thigh after surgery for a hernia. The hernia involved in this matter was the fourth operated hernia Mr. Jeffery had experienced. Dr. Naldoza, the surgeon who performed the surgery for the subject hernia, indicated the numbness in the region was likely caused by the surgery he performed. Dr. Schlachter opined Mr. Jeffery had a 2% general body disability due to the severance of the ilioinguinal nerve. A third physician, Dr. Street, provided no opinion as to what caused damage to the ilioinguinal nerve, but concluded there was no impairment of function attributable to the surgery or resulting loss of sensitivity. In that case this Board agreed with Dr. Street and determined the numbness did not justify a rating for loss of function. In *Jeffery* the greater weight of the expert testimony was that Mr. Jeffery's condition did not meet the criteria for a permanent impairment of function.

⁴⁷ *Jeffery v. Wichita Boeing Employees Association*, No. 155,456 1995 WL 338195 (Kan. WCAB Feb. 13, 1995).

The facts of *Jeffery* and the current case are distinguishable in that the claimant in this case has pain, not just loss of sensation. Moreover, two physicians, Dr. Sollo and Dr. Koprivica, indicate the damage to claimant's ilioinguinal nerve and his musculoskeletal injury, while attributable to his hernia repairs, are nonetheless conditions that are separate and distinct from the hernia. Dr. Macy removed a neuroma during the second surgery and Dr. Sollo performed a nerve block in an attempt to address ongoing pain claimant was experiencing. In *Jeffery*, the injured worker only had numbness and a loss of sensitivity, whereas in this matter claimant continues to have pain in his pubic region.

Dr. Koprivica's testimony that claimant's musculoskeletal and ilioinguinal nerve injuries are separate and distinct injuries from his hernia is persuasive, as is his testimony that the AMA *Guides* allows a functional impairment for injury to a sensory nerve. Consequently, this Board finds claimant suffered a 5% permanent impairment of function to the body as a whole as a result of his musculoskeletal injury and injury to his ilioinguinal nerve.

The only evidence of claimant's task loss was elicited from Dr. Koprivica, who indicated claimant has a 61% task loss. Therefore, the Board will adopt the findings of Dr. Koprivica as to task loss.

Claimant's wage loss is easily determinable through May 8, 2007, the approximate date temporary total disability benefits ceased. Claimant was employed at Exide until September 10, 2006, so there was no wage loss from the date of accident (October 20, 2005) through September 10, 2006. From September 11, 2006, through approximately February 6, 2007, claimant worked for TIC and his average weekly wage was higher than at Exide; accordingly, there would be no wage loss. On February 7, 2007, claimant had his second hernia surgery and received temporary total disability benefits through approximately May 8, 2007.

The conundrum is determining claimant's wage loss from May 9, 2007, and following. From May 9, 2007, through the date of the regular hearing (September 7, 2010), claimant worked as an independent subcontractor or contractor, with the exception of a short period of time for the period of approximately April 15, 2010, through May 5, 2010, when he earned \$12 per hour working approximately 30 hours a week for Loux Home Improvement. Claimant's lackadaisical record keeping makes it nearly impossible to determine what he earned as an independent subcontractor or contractor.

From May 9, 2007, through December 31, 2007, claimant had no earnings information whatsoever. Claimant indicated he earned \$7,000 in 2008 and \$12,947 in 2009, but introduced no tax or business records to verify his income. Claimant's earnings for 2010 are equally nebulous except for the three weeks he worked at Loux Home Improvement. From May 6, 2010, through approximately September 6, 2010, claimant testified he was paid \$13 per hour to brush hog, but it appears that at the time he was still

working as an independent contractor. Claimant admitted that he had worked mainly on a cash basis and did not always report all of his subcontracting work earnings.⁴⁸

The parties stipulated that at the time of claimant's accident his average weekly wage (AWW) was \$971.63 without fringe benefits and \$1,226.33 with fringe benefits and that the fringe benefits ended on September 10, 2006. The burden of proof is on claimant that he has suffered a wage loss, and respondent argues claimant is not entitled to a work disability because he quit two jobs that paid 90% or more of his pre-injury average weekly wage.

The statutory language at issue is the language found in K.S.A. 44-510e(a), which states:

An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee **is engaging** in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury. (Emphasis added.)

K.S.A. 44-510e(a) limits a claimant to compensation for functional impairment so long as the claimant earns a wage equal to 90% or more of the pre-injury average weekly wage.

The claimant has met his burden of proof that he suffered a wage loss of more than 10% of his pre-injury average weekly wage, at least at certain relevant times. In essence, claimant's testimony is the only evidence of claimant's post-injury earnings. Per *Bergstrom*⁴⁹ a claimant is no longer required to show a good faith effort in keeping or attempting to find a job. Therefore, claimant's wage loss and work disability (when averaging claimant's 61% task loss with the various percentages of wage loss) is as follows:

(October 20, 2005, through February 6, 2007:	no wage loss; 5% functional impairment)
(February 7, 2007, through May 8, 2007:	temporary total disability)
May 9, 2007, through December 31, 2008:	89% wage loss and a 75% work disability
January 1, 2009, through December 31, 2009:	80% wage loss and a 71% work disability
January 1, 2010, through April 14, 2010:	89% wage loss and a 75% work disability

⁴⁸ Goudy Depo. at 32-33.

⁴⁹ *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 214 P.3d 676 (2009).

April 15, 2010, through May 5, 2010:	70% wage loss and a 66% work disability
May 6, 2010, through September 6, 2010:	58% wage loss and a 60% work disability
Beginning September 7, 2010:	40% wage loss and a 51% work disability

Future medical benefits will be considered upon proper application.

AWARD

WHEREFORE, the Board affirms in part and modifies in part the December 15, 2010, Award entered by ALJ Moore:

Michael A. Goudy is granted compensation from Exide Technologies and its insurance carrier for an October 20, 2005, accident and the resulting disability.

Claimant is entitled to receive \$4,261 in temporary partial disability benefits.⁵⁰

For the period through February 6, 2007, claimant is entitled to receive 20.75 weeks of permanent partial disability benefits at \$467 per week, or \$9,690.25, for a 5% permanent partial disability.

For the period from February 7, 2007, through May 8, 2007, claimant is entitled to receive 13 weeks of temporary total disability benefits at \$467 per week, or \$6,071.

For the period from May 9, 2007, through December 31, 2008, claimant is entitled to receive 86.14 weeks of permanent partial disability benefits at \$467 per week, or \$40,227.38, for a 75% permanent partial disability.

For the period from January 1, 2009, through December 31, 2009, claimant is entitled to receive 52.14 weeks of permanent partial disability benefits at \$467 per week, or \$24,349.38, for a 71% permanent partial disability.

For the period from January 1, 2010, through April 14, 2010, claimant is entitled to receive 14.86 weeks of permanent partial disability benefits at \$467 per week, or \$6,939.62, for a 75% permanent partial disability.

⁵⁰ For calculation purposes, the temporary partial disability would convert to 9.12 weeks of temporary total disability.

For the period from April 15, 2010, through May 5, 2010, claimant is entitled to receive 3 weeks of permanent partial disability benefits at \$467 per week, or \$1,401, for a 66% permanent partial disability.

The period from May 6, 2010, through September 6, 2010, is 17.71 weeks, but due to the maximum disability compensation benefit of \$100,000 pursuant to K.S.A. 44-510f, claimant is entitled to receive 15.12 weeks of permanent partial disability benefits at \$467 per week, or \$7,060.37, for a 60% permanent partial disability and a total award not to exceed \$100,000 which is all due and owing less any amounts previously paid.

The Board adopts the remaining orders set forth in the ALJ's Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of June, 2011.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

CONCURRING AND DISSENTING OPINION

The undersigned Board Members concur with the majority that the damage to claimant's ilioinguinal nerve and his musculoskeletal injury, while attributable to his hernia, are nonetheless separate and distinct medical conditions that are ratable impairments separate and apart from the hernia. Dr. Koprivica's testimony explaining this is credible and persuasive. The undersigned Board Members dissent from the majority's conclusion that claimant suffered a permanent impairment of function as a result of the injury.

Dr. R. Larry Beamer testified claimant's left testicular pain should not have been related to the initial accident or as a result of the subsequent operations, as the hernia was right-sided. He also noted claimant's groin pain is musculoskeletal and not related to

neuralgia. For claimant's groin pain, Dr. Beamer recommended a 2% rating, but he did not know whether he used the *AMA Guides*.⁵¹ Dr. Beamer gave claimant no work restrictions.

Dr. David G. Sollo saw claimant on one occasion and the doctor diagnosed pubic tubercle osteitis and indicated claimant had damage to his ilioinguinal nerve. However, he testified claimant suffered no loss of motor control, nor did he think there resulted any problem with the surrounding tissue.⁵² No testimony was elicited from Dr. Sollo as to whether claimant has a functional impairment or any work restrictions.

Consulting the *AMA Guides*, Dr. P. Brent Koprivica assigned claimant a 5% functional impairment to the body as a whole. Dr. Koprivica restricted claimant to self-limiting lifting and carrying to less than 50 pounds; avoiding frequent or constant lifting and carrying; and avoiding sustained or awkward postures, such as forward bending, especially against hard surfaces where there is direct pressure put in the right lower abdominal area.

Dr. Koprivica's impairment rating is based solely upon claimant's chronic pain and he cites a passage on page 2 of the *AMA Guides*. This passage is a general guideline only. Dr. Koprivica did not cite any table or chapter of the *Guides* to support his finding of a 5% impairment rating. Dr. Koprivica indicated there is no DRE category in the *AMA Guides* that applies to this case. He also testified the *AMA Guides* does not contain guidelines for rating an impairment of the ilioinguinal nerve. Dr. Koprivica indicated the 5% impairment rating was representative globally of the impact of the injury which is musculoskeletal plus the ilioinguinal nerve contribution.

Dr. Sollo indicated claimant ". . . did drywalling, that's pretty tough work, and if you can do that, then I didn't want to go any further with any other intervention."⁵³ Claimant testified that after his second surgery he went to work doing odd jobs. Many of claimant's current job tasks exceed Dr. Koprivica's restrictions. Claimant was asked about the odd jobs and testified as follows:

Q. (Mr. Denning) When you were working, I'll call them odd jobs --

A. (Claimant) Right.

Q. -- for these subcontractors?

A. Right.

⁵¹ Beamer Depo. at 11.

⁵² Sollo Depo. at 15-16.

⁵³ *Id.*, at 17.

Q. What types of physical activities were you performing?

A. Drywall, painting, tile. Some window repairs.

Q. Any heavy lifting?

A. Well, yeah, I mean, you pick up a box of drywall mud and it's 50 pounds, or five gallons of paint, you know, is basically around the same weight, you know. I never did any dry -- putting up drywall by myself because it was too awkward and, you know, anytime I always helped or had help.⁵⁴

K.S.A. 2005 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation by proving the various conditions on which the claimant's right depends."

K.S.A. 2005 Supp. 44-508(g) defines burden of proof as follows: "Burden of proof means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

Claimant has failed to prove by a preponderance of the evidence that he has a permanent functional impairment as a result of his injury and subsequent hernia repairs. Claimant's award should be limited by K.S.A. 44-510d(a)(22).

BOARD MEMBER

BOARD MEMBER

c: Jan L. Fisher, Attorney for Claimant
Jared T. Hiatt, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge

⁵⁴ Goudy Depo. at 37-38.